# THE ROLE AND NATURE OF CRITERIA FOR SELECTION AND PRIORITIZATION OF CORE INTERNATIONAL CRIMES: THE SITUATION IN BOSNIA AND HERZEGOVINA

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# Content

# 1 Introduction

## 1.1 The situation and the problem discussed in the thesis and its purpose

Armed conflicts with many core international crimes committed entail many suspects. When many case files involving core international crimes have been opened, the criminal justice system may face big challenges in processing all or a large proportion of cases. Core international crimes are severe and massive offences and are of such a nature that their consequences shock and affect the whole world community. Thus, the international instruments impose on states an obligation to prosecute and punish those who committed such crimes.[1] Notwithstanding the doctrine of universal and other legal grounds

[1] Four Geneva Conventions of 1949, namely Articles 49, 50,129 and 146 respectively; Article IV of the Convention on the Prevention and Punishment of the Crimes of Genocide and the sixth preambular paragraph of the International Criminal Court (hereinafter: ICC) Statute. See also *Commentary on the Rome Statute of the International Criminal Court*. Edited by Otto Triffterer. Second edition. Munich, (C.H.Beck-Hart-Nomos) 2008, p. 11. The obligation to prosecute crimes against humanity is still disputable by some. The obligation to prosecute crimes of genocide and war crimes is firmly rooted in the conventional law, as specified above. On the contrary, there is no specialized convention with respect to crimes against humanity. Thus, it has to be established that the obligation is a part of customary international law. It is highly questionable whether a multilateral treaty such as the ICC Statute is indeed a codification of pre-existing customary obligation to prosecute crimes against humanity. Nonetheless, it is warranted to stress that the obligation to prosecute crimes against humanity is advocated for by many scholars. See for instance Bassiouni, Cherif. *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights.* Post-Conflict Justice, (Transnational Publishers, Inc., USA), 2002, p. 12, 13.; Scharf, Michael P. and Rodley, Nigel. *International Law Principles on Accountability*. Post-Conflict Justice, (Transnational Publishers, Inc., USA), 2002, p. 94.; Cassese, Antonio. *Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law, The Kolk and Kislyiy v. Estonia Case before the ECHR*. Journal of International Criminal Justice 4, (2006), p. 410 – 418. In this regard, see also the ruling of the international criminal tribunal, *Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory*

of jurisdiction, such as active and passive nationality principles, the majority of cases involving core international crimes will probably be processed by the authorities of the state where those crimes have been committed.[2] Ideally, in order to comply with the said obligation, the relevant authorities should search for and prosecute all those who have committed war crimes. Moreover, international instruments on human rights[3] promote certain values that all states of the world consider important and call for their protection.[4]

In addition, the concept of transitional justice, which emerged in the late 1980's and the early 1990's, demands from societies in their transition to democracies to address the past human rights abuses.[5] The transitional justice approach includes a range of mechanisms: criminal prosecutions, truth commissions, reparations, justice system reforms, reconciliation, etc.[6] Post-conflict justice is a way to deal with the past by promoting peace and reconciliation for the future. It also calls for the restoration and development of the

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*Appeal on Jurisdiction*, Case No. IT-94-1, 2 October 1995, , para. 137 - 142. In addition, many argue that the crimes against humanity have reached the status of *jus cogens* norms, thus entailing the obligation *erga omnes* to prosecute those who commit the crime. For instance, see generally Bassiouni, Cherif. International Crimes: *Jus Cogens and Obligation Erga Omnes*. Volume 59: No. 4, Law & Contemporary Problems 63 (1996).

[2] For discussion on legal grounds of jurisdiction see more Cassese, Antonio. *International Law*. Second Edition. Oxford, (Oxford University Press) 2005, p. 431, 452.

[3] See Universal Declaration of Human Rights, Preamble; European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1.

[4] In order to address human rights breaches as specified in the ECHR, the Human Rights Chamber was established in BiH under the Annex 6 to the Dayton Peace Agreement and its Protocols. See more at http://www.hrc.ba/ENGLISH/DEFAULT.HTM. [Visited May 201]

[5] *Case of Velasquez – Rodriguez v. Honduras, Judgment*, Inter – American Court on Human Rights, 29 July 1988, para. 161 – 188. In this case the Court found that any state has four fundamental obligations in the field of human rights. These are: taking measures to prevent violation of human rights, conducting serious investigation in case of breach, imposing suitable actions on those responsible and ensuring reparations for the victims. These findings are in part the basis for the transitional justice concept. See more at http://es.ictj.org/en/tj/. [Visited May 2011]

[6] See more at the International Center for Transitional Justice website http://es.ictj.org/en/. [Visited May 2011] See also Bickford, Luis. *Transitional Justice*. The Encyclopaedia of Genocide and Crimes against Humanity, Volume 3 (Macmillan Library Reference, USA) 2004, p. 1045-1047.

justice system which has been destroyed or damaged due to the past conflict.[7] But, the transitional societies affected with past atrocities may face extraordinary difficulties in trying to deal with the accumulated backlog of core international crimes cases and its consequences to victims and the society in general.

From 1992 to 1995 in Bosnia and Herzegovina (BiH) a great number of gross violations of international humanitarian law was committed. The armed conflict, which lasted for almost four years, was conducted with such cruelty and massiveness that it ended up in enormous human losses, displaced persons, refugees, missing persons and property destruction. Despite a clear determination of the international community and criminal justice system of BiH to deal with atrocities committed during the war, the number of outstanding cases still remains extremely high. Likewise, numerous persons allegedly responsible are still at-large. In December 2008, as an attempt to comprehensively and systematically tackle this issue, the Ministry of Justice of BiH adopted the National War Crimes Strategy with the aim to process the most complex and top priority cases within the 7 – year time limit and all other war crimes cases within 15 years of its adoption. The case selection and prioritization criteria that should facilitate this process form an integral part of the Strategy.

Therefore, this paper poses the following question: What are the prospects and dangers of the criteria effectively addressing the question of the case backlog in Bosnia and Herzegovina of the core international crimes?

This thesis will examine the prospects and dangers of case selection and prioritization criteria as an approach undertaken by the BiH criminal justice system to tackle the large backlog of core international crimes cases on its path towards full accountability for crimes committed. BiH has adopted the case selection and prioritization criteria in order to address its large case-load, thus making a meaningful step towards ending the impunity for the worst crimes.

The case selection and prioritization criteria are quite a new concept. It emerged in the 1990's with the creation of the International Tribunal for the former Yugoslavia (ICTY)

[7] Bassiouni, Cherif. *Introduction, Post-Conflict Justice*, (Transnational Publishers, Inc., USA), 2002, p. xv.

as a response to mass atrocities being committed in the territory of ex-Yugoslav countries, especially in Bosnia and Herzegovina. As a consequence of the ICTY completion strategy[8], the epicentre of this issue moved from the international to domestic scene. It became clear that only a limited number of cases will be prosecuted by the ICTY[9] and that the majority of cases will be processed in BiH.[10] Domestic trials are necessary to combat the impunity and ensure respect for rule of law.[11]

In this light, the purpose of this thesis is to present and assess the prospects and the dangers of the criteria in BiH as part of its strategy to ensure that those most accountable are brought to justice as a priority, alongside with all others allegedly responsible in the said timeframe. Therefore, Bosnia and Herzegovina's experience will be presented as a case study which may serve as a useful model for any other society facing similar challenges.

## 1.2 Thesis structure

This thesis is organized as follows:

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[8] According to the Report of 19 November 2010, submitted by the President of the ICTY to the United Nations Security Council regarding the implementation of the completion strategy, all trials are expected to be completed in 2012. The only exception is the trial of Radovan Karadžić, which is expected to finish at the end of 2013. All of the appellate work is scheduled to be completed by the end of 2014. See Letter dated 19 November 2010 of the President of the ICTY addressed to the President of the Security Council, S/2010/270 available at http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_19nov2010_en.pdf. [Visited May 2011]

[9] Until 19 April 2011, the ICTY has indicted 161. Out of this number 89 cases including 125 accused have been completed, 15 cases with 36 accused are still ongoing; http://www.icty.org/sections/TheCases/KeyFigures. [Visited April 2011]

[10] UNSC Resolution 1503 (2003) noted that the establishment and functioning of the War Crimes Chamber of BiH Sate Court is "an essential prerequisite to achieving the objective of the ICTY Completion Strategy". See UNSC Resolution No.1503 (2003), S/RES/1503(2003), 28 August 2003, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_1503_2003_en.pdf. [Visited May 2011]

[11] *Narrowing the Impunity Gap, Trials before Bosnia's War Crimes Chamber.* Convened by Human Rights Watch (February 2007), Vol. 19, No. 1(D), p. 3.

- Chapter 2 will provide background information on specific post-conflict political, social and legal circumstances in BiH. It will also contain presentation of BiH prosecutorial and judicial institutions responsible for trying war crimes cases.
- Chapter 3 will discuss the case selection and prioritization criteria in BiH as well as those created under the auspices of the ICTY and International Criminal Court (ICC). Reasons that have lead to the criteria's adoption including key figures on number of opened cases files and number of suspects still at large will be presented herein. Limitations of BiH criminal justice system, the importance of processing war crimes and the role of the criteria will then be identified. In the light of their influence to the criteria in BiH, the criteria at the ICTY and ICC documents as well as the case law on the same matter will also be studied in this chapter.
- Chapter 4 sets forth relevant requirements for the criteria's success in post-war transition in BiH.
- And finally Chapter 5 will provide some concluding remarks.

## 1.3 Methodology and sources

The theme of this thesis is quite new in international criminal law. It emerged in the 1990's in the work of the ICTY, but its importance was not recognized fully until the national authorities came to be regarded as principal actors in providing full accountability for core international crimes. The theme reached reaffirmation in the work of the ICC. Nevertheless, the literature is still scant on the criteria for selection and prioritization of core international crimes cases, most probably due to the novelty of the subject matter. Moreover, the sources pertaining to BiH are even more limited, given the fact that a clear lack of appropriate academic and practitioner's forum suitable for expressing their ideas and views exists. Thus, the practice and jurisprudence of the two international courts, the ICTY and ICC provided a basis on which the criteria in BiH were built on. Therefore, some selected criteria from the ICTY, ICC and BiH National Strategy will be examined here by the use of comparative legal analysis method.

As BiH might be considered as an experimental floor for criminal justice and international criminal law in many aspects, and as a rare example of a country with structured and systematic approach to the large backlog of war crimes case, the prospects and dangers of its domestic regulation of core international crimes cases are therefore studied herein. By the use of empirical data and other appropriate sources, the criteria's prospects and dangers will be measured and methodically studied.

The sources employed in this paper are laws, treaties, United Nations and other legal documents, strategies, academic articles, books, court decisions (international and domestic), press statements, reports from different organizations, etc.

## 1.4 Clarification of terms

For the purpose of this thesis, certain clarifications regarding terminology employed herein have to be made. The term "core international crimes" should be considered synonymous to the term "war crimes" *lato sensu*, and both will be used interchangeably to refer to crimes of genocide, crimes against humanity and war crimes *stricto sensu*, as defined by international legal documents such as the Statute of the ICTY and ICC.[12] In BiH's context these expressions should include genocide, crimes against humanity and war crimes *stricto sensu* as defined by the Criminal Code of BiH[13], entity and district Criminal Codes as well as by the Criminal Code of Socialist Federal Republic of Yugoslavia as applicable at the time of the alleged perpetration of the offences. "Criminal justice system" is defined as collective institutions through which an accused offender passes until the accusation has been disposed of or punishment concluded.[14] The best suited case is a case that meets the agreed criteria which normally seems to include a consideration of the gravity of the crime, the seniority of the suspect, the strength of the evidence and other relevant considerations. "Selection of cases" refers to a process of reaching a decision on which forum or venue is

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[12] See Articles 6, 7 and 8 of the ICC Statute; Articles 2, 3, 4 and 5 of the ICTY Statute.

[13] See Articles 171 – 175 of the Criminal Code of BiH, available at http://sudbih.gov.ba/?opcija=sadrzaj&kat=6&id=20&jezik=e [Visited February 2011]

[14] *Black's Law Dictionary*. Edited by Bryan A. Garner … [et al.]. Deluxe Eight Edition, Minesota, Saint Paul, (West Group) 2004., p. 403.

the most appropriate to process a certain case. It signifies the distribution of cases between relevant courts. "Prioritization of cases" means deciding to proceed with a certain case before other cases, *i.e.* giving a priority to a particular case. Case selection and prioritization criteria may be used as a tool in order to reach both types of decisions. Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy.[15]

# 2 The Background

## 2.1 Background information on BiH post-conflict constitutional realities

Understanding the complexity of the design of the State of BiH is crucial for the appreciation of its post-war transition. "*It's a state by international design and of international design*".[16]

The war in BiH lasted from 1992 to 1995. It was brought to end by the conclusion of the General Framework Peace Agreement for Bosnia and Herzegovina (the Dayton Peace Agreement)[17], which was signed on December 14, 1995 in Dayton, Ohio, USA. It was signed by Alija Izetbegović, Franjo Tuđman and Slobodan Milošević on behalf of their countries, namely BiH, Republic of Croatia and Serbia, respectively. The fact that this Agreement ended the war in BiH is undisputable, but its implementation remains an ever struggling battle. Built on the foundations of ethic cleansing, leaving the society deeply divided and "polarized on the most basic issues – the question on the legitimacy of the

[15] See http://es.ictj.org/en/tj/. [Visited May 2011]

[16] Bose, Sumantra. *Bosnia after Dayton, Nationalist partition and International Intervention*. London (Hurst & Company) 2002, p. 60. It is well-known in BiH that the Dayton Peace Agreement was mainly the work of the lawyers from the USA.

[17] Availabe at http://www.ohr.int/dpa/default.asp?content_id=380. [Visited May 2011]

state, its common institutions and its borders"[18] had lead to a long lasting battle "to buil[d] a 'single multiethnic country' in any meaningful sense"[19].

Pursuant to Dayton Peace Agreement, BiH is divided into two entities: Federation of BiH (FBiH) and Republic of Sprska (RS). In 1999 the status of Brčko was finally settled by the Arbitration Tribunal for the Dispute over the Inter-Entity Boundary Line in Brčko Area. Brčko District is established as a separate administrative unit with local self-governance placed under the sovereignty of BiH.[20] The FBiH is administratively divided into ten federal units called cantons. Republic of Srpska consists of five administrative units referred to as districts. The Constitution of BiH[21] established a very complex political structure with very limited central institutions powers.[22] The central government consists of bicameral legislative body, the three-member Presidency (one from each constituent peoples: Bosniacs, Serbs and Croats), the Council of Ministers (consisting of nine ministries including the Ministry of Justice), the Constitutional Court (composed of mixture of national and international judges) and the Central Bank.[23]

## 2.2 Specific legal, political and social aspects of BiH post-conflict transition

The war in BiH was undoubtedly the most horrible armed conflicts in Europe after the Second World War. It is estimated that the war resulted in 97, 207 human lives lost; out of this number 39, 684 persons were civilians. In terms of ethnicity, 65. 88% were Bonsniacs, 25. 62% Serbs, 8. 01% Croats and 0. 49% others.[24] Around 2.2 million of people became

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[18] Bose, Sumantra. *Bosnia after Dayton, Nationalist partition and International Intervention*. London (Hurst & Company) 2002, p. 3.

[19] Ibid., p. 53.

[20] Article 1(1) of the Statute of Brčko District of BiH, available at http://www.ohr.int/ohr-offices/brcko/default.asp?content_id=5367. [Visited May 2011]

[21] Annex 4 of the Dayton Peace Agreement, available at http://www.ohr.int/dpa/default.asp?content_id=372. [Visisted May 2011]

[22] Article III(1) of the Constitution of BiH.

[23] Articles IV, V, VI and VII of the BiH Constitution, respectively.

[24] These figures are the result of the research conducted by the Research and Documentation Center, situated in Sarajevo under its project "Population Losses in BiH '91 – '95". The presented numbers include only

refugees. In addition, 1.3 million were internally displaced.[25] Today, up to 10, 000 people are still missing in BiH.[26] It does not therefore come as a surprise that in the aftermath of the armed conflict in BiH the functioning of its judicial system has suffered from numerous difficulties. The war brought about a great loss of skilled members of the legal profession and the judiciary, along side with the physical destruction and lack of proper equipment or facilities. As a consequence, the courts and prosecutors offices throughout the country were filled by judges whose appointment was based on political and ethnic grounds. This has significantly hampered the ability of the courts to administer justice in a proper and efficient manner.[27] The complex constitutional structure of BiH, as explained in the previous sub-chapter, has worsened the situation even more. Thus, strengthening the rule of

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direct victims of war, *i.e.* persons whose death is the result of direct military operations. The second part of the project aims to establish a record on indirect victims of the war in BiH. See more at http://www.idc.org.ba/index.php?option=com_content&view=section&id=35&Itemid=126&lang=bs. [Visited May 2011] It is useful to mention that this project is important not only for the fact that it presents a valuable database on number of victims in BiH war, but also for the fact that it will as such help reduce the possibility to play with the numbers of war victims. For long time, the number of victims was manipulated with and has been a source of lots of controversy, for numerous political and other reasons. The estimations ranged from 25, 000 to 200, 000 war victims. See more at http://birn.eu.com/en/88/10/3377/. [Visited May 2011] Also see *Report of the Secretary-General on the UN Mission in BiH*, UN Doc S/2002/1314, dated December 02, 2002, p. 2.

[25] Press Release by the United Nations High Commissioner for Refugees, Representation in BiH of May 2006, available at http://www.unhcr.ba/press/state%20of%20annex7.htm. [Visited July 2010] See also *Update of UNHCR's Position on Categories of Persons from Bosnia and Herzegovina in Need of International Protection*, UNHCR, August 2009, p. 1.

[26] See Press Release of the International Commission for Missing Persons of 31 August 2009, available at http://www.ic-mp.org/press-releases/address-by-kathryne-bomberger-director-general-international-commission-on-missing-persons-commemoration-of-the-international-day-of-the-disappeared-obracanje-kathryne-bomberger-generalne-direktor/#more-1102. [Visited May 2011]
See also http://www.bim.ba/en/182/10/21928/. [Visited May 2011]

[27] *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles*. Convened by OSCE Mission to Bosnia and Herzegovina. Sarajevo, March 2005., p. 4, available at http://www.oscebih.org/documents/osce_bih_doc_20101223110249 92eng.pdf. [Visited May 2011]

law in BiH was considered a priority in its post-conflict transition.[28] From 2002 and 2003 comprehensive legal and institutional reforms were carried out (see next sub-chapter).

One of the important specificities of the BiH post-conflict transition is the position assumed by the international community. The international community had and it still has a significant role in BiH's day to day life. Different international organizations were called to assist in the enforcement of the Dayton Peace Agreement.[29] Most importantly, the High Representative, who is also the European Union Special Representative, was designated in order to supervise the implementation of the civilian aspects of the Dayton Peace Agreement on behalf of the international community.[30] The High Representative was given such broad powers that it was declared to be the final authority regarding the implementation of the civilian aspects of the Agreement. These powers[31] were further expanded by the Peace Implementation Council[32] Conference held in Bonn in December 1997. They included the powers to remove from office public officials who violate legal commitments and the Dayton Peace Agreement, and to impose laws he deems appropriate if BiH's legislative bodies fail to do so.[33]

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[28] *Declaration of the Peace Implementation Council*, Madrid, 16 December 1998, paragraph 12, available at http://www.oscebih.org/documents/19-eng.pdf. [Visited February 2011] ; *Final Report of the Independent Judicial Commission, January 2001 – 31 March 2004*, November 2004, p. 3, available at http://www.hjpc.ba/reports/pdf/final_report_eng.pdf. [Visited February 2011]

[29] Some of them are the Organization for Security and Co-operation in Europe, United Nations Development Programme , European Union Police Mission, United Nations High Commissioner for Refugees, etc.

[30] Annex 10 of the Dayton Peace Agreement. UNSC has also supported the appointment of the High Representative; see UNSC Resolution No. 1031, S/RES/1031 (1995), 15 December 1995, available at http://www.ohr.int/other-doc/hr-reports/default.asp?content_id=5008. [Visited May 2011]

[31] Also known as Bonn powers.

[32] See more at http://www.ohr.int/pic/default.asp?content_id=38563. [Visited May 2011]

[33] Article XI.2 of the *Peace Implementation Council Conclusions* dated 10 December 1997, available at http://www.ohr.int/pic/default.asp?content_id=5182. [Visited May 2011] Up to date, the High Representative used the Bonn powers in many instances. On the role of High Representative in BiH, see also Bose, Sumantra. *Bosnia after Dayton, Nationalist partition and International Intervention*. London (Hurst & Company) 2002, p. 6 and 7.

It is important to highlight that BiH is still a divided country, not only in terms of its administrative structures, but in social terms as well. The national interests of the three constituent peoples[34] Bosniacs, Croats and Serbs are used by the political parties to achieve different political objectives and politically motivated decisions.[35] National polarization and division is still present and governs the main political, judicial[36] and other processes in BiH. It remains a stumbling stone on its path towards achieving full participation into European integration.

## 2.3 Overview of BiH judicial and prosecutorial system for the prosecution and adjudication of core international crimes

The state of BiH judiciary was an issue of concern in years after the war.[37] The need for a comprehensive reform was apparent and it was advocated for by many different sources.[38]

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[34] See last preambular paragraph of the BiH Constitution. In the case *Sejdić and Finci v. Bosnia and Herzegovina* the European Court of Human Rights has found discriminatory the provisions of the Dayton Peace Agreement which stipulates that only those belonging to one of the three constituent peoples of BiH are permitted to stand for elections to the House of Peoples or for the Presidency, thereby excluding members of the 14 other national minorities in the country. The ECHR found that this amounted to breach of Article 14 of the European Convention on Human Rights taken in conjunction with Article 3 of Protocol 1, as well as of Article 1 of Protocol 12. In order to implement the decision of the Court, vital changes to the Constitution of BiH are required. See *Case of Sejdić and Finci v. Bosnia and Herzegovina, Judgment*, 22 December 2009, The European Court of Human Rights, Grand Chamber, Strasbourg.

[35] See generally *Reshaping international priorities in Bosnia and Herzegovina*, Part One, Bosnian Power structures, 14 October 1999, convened by the European Stability Initiative available at http://www.esiweb.org/pdf/esi_document_id_4.pdf. [Visited February 2011]

[36] *Thematic Report IX, Political Influence: The Independence of the Judiciary in Bosnia and Herzegovina*, convened by the UN Mission in BiH, Judicial System Assessment Programme (November 2000), p. 13.

[37] *Thematic Report VII, Prosecuting Corruption: A Study of the Weaknesses of the Criminal Justice System in Bosnia and Herzegovina*, convened by the UN Mission in BiH, Judicial System Assessment Programme (November 2000).

[38] *Thematic Report X, Serving the Public: The Delivery of Justice in Bosnia and Herzegovina*, convened by the UN Mission in BiH, Judicial System Assessment Programme (November 2000); *Thematic Report IX, Political Influence: The Independence of the Judiciary in Bosnia and Herzegovina*, convened by the UN

The judicial system reform was considered crucial for the enhancement of the rule of law and independence and professionalism of the judges and prosecutors all over the country.[39] The Independent Judicial Commission was created in the auspices of the Office of the High Representative in order to facilitate the judicial reform programme in BiH.[40] This task was taken over by the High Judicial and Prosecutorial Council in 2002.[41] Consequently, broad reforms of judicial and prosecutorial system[42] combined with substantive and procedural criminal legislation reform,[43] both at the state and entity level were carried out in 2002 and 2003, respectively.

The prosecution and adjudication of core international crimes is shared between the state and entity/Brčko District prosecutorial and judicial institutions.[44]

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Mission in BiH, Judicial System Assessment Programme (November 2000); *Courting Disaster: The Misrule of Law in Bosnia and Herzegovina*, convened by the International Crisis Group (25 March 2002).

[39] *Restructuring of Bosnia and Herzegovina Prosecutorial System*, convened by the Office of the High Representative, Criminal Institutions and Prosecutorial Reform Unit (2002), p. 3.

[40] *Independent Judicial Commission takes on development of Judiciary in BiH*, Press Release by the Office of the High Representative (30 November 2000).

[41] *Final Report of the Independent Judicial Commission, January 2001 – 31 March 2004*, November 2004, p. 76 – 81, available at http://www.hjpc.ba/reports/pdf/final_report_eng.pdf. [Visited February 2011]

[42] The courts and prosecutor's offices were restructured and all judges and prosecutors were reappointed.

[43] New Criminal Code of BiH incorporated core international crimes, *i.e.* genocide, crimes against humanity and war crimes, while the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia, which was in force during war in BiH, criminalized the acts prohibited under the Geneva Convenctions. The new Criminal Procedure Code was a shift towards more adversarial model of criminal justice, while at the same time some typical inquisitorial components were abolished (the most significant one is the role of investigative judge). In this way a mixed model of investigation and court proceedings was created with several important new institutes: plea bargaining, the preliminary hearing and preliminary proceedings judges, new rules on presentation of evidence, cross-examination of witnesses, etc. See in general *OSCE Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of Bosnia and Herzegovina*, convened by the OSCE, Mission to BiH, Sarajevo, December 2004.

[44] Barria A., Lilian and Roper D., Steven. *Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY*. Human Rights Review, Volume 9, Number 3 (2008), p. 3 – 5; *Justice Chain Analysis, Bosnia and Herzegovina*, commissioned by the Swedish International Development Agency, Sarajevo (June 2007), Chapters 2 and 3.

At the state level, in 2000 the Court of BiH was established by the decision of the High Representative, but it became operational in May 2002 when the first judges were appointed. The Court of BiH (also known as the State Court) was created in order to ensure the effective exercise of the competencies of the State of BiH and the respect of human rights and the rule of law.[45] In January 2005, the War Crimes Chamber[46] was established within the Criminal Division of the State Court in order to process the most serious war crimes cases committed during conflict in BiH including both the cases transferred by the ICTY as a result of its completion strategy and the cases initiated locally.

The Prosecutor's Office of BiH is the institution responsible for the investigation and prosecution of cases before the State Court. It was established by the decision of the High Representative in August 2002[47]. For the purpose of prosecution of war crimes cases, the War Crimes Department within the Prosecutor's Office of BiH was created in January 2005.

In FBiH there are 28 municipal courts with the jurisdiction over lower-level cases, *i.e.* those cases for which the maximum sentence of 10 years of imprisonment may be prescribed[48] and 10 cantonal courts acting as courts of first instance for adjudication of cases with minimum 10 years of imprisonment prescribed, as well as the second instance courts when municipal courts' decisions are contested.[49] The ten cantonal courts have

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[45] Law on Court of BiH, Article 1 (Official Gazette of BiH No. 29/00, 16/02, 24/02, 03/03, 37/03, 42/03, 04/04, 09/04, 35/04, 61/04, 32/07, 97/09, 74/09), also available at http://sudbih.gov.ba/?opcija=sadrzaj&kat=6&id=20&jezik=e. [Visited May 2011] For more information on the Court of BiH, see the website http://sudbih.gov.ba/?jezik=e. [Visited May 2011]

[46] *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles*. Convened by OSCE Mission to Bosnia and Herzegovina. Sarajevo, March 2005, p. 10; see also *Security Council briefed on establishment of War Crimes Chamber within State Court of Bosnia and Herzegovina*, SC/7888, October 8, 2003, available at http://www.un.org/News/Press/docs/2003/sc7888.doc.htm. [Visited May 2011]

[47] Law on the Prosecutor's Office of BiH (Official Gazette No. 24/02, 03/03, 37/03, 42/03, 09/04, 35/04, 61/04 and 61/09), also available at http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=4&id=37&jezik=e. [Visited May 2011]

[48] Law on Courts of FBiH, Articles 16, 22 and 27 (Official Gazette of FBiH No. 38/04 and 22/06)

[49] Ibid., Article 17, 25 and 28.

jurisdiction to try war crimes. In addition, at the Federation level there is also the Supreme Court of FBiH serving as an appeal court for decisions of cantonal courts.[50]

At the Federation level, there are 11 prosecutors' offices, namely the Prosecutor's Office of the FBiH[51] and 10 cantonal prosecutors' offices[52].

The RS court structure is parallel to FBiH court system: there are 19 basic courts competent to adjudicate lower-level criminal offences for which imprisonment up to 10 years may be pronounced and 5 district courts serving as first instance courts for crimes punishable with minimum sentence of 10 years of imprisonment and as second instance courts competent to decide upon appeals to basic courts' decisions.[53] War crimes cases are adjudicated before district courts of RS. The Constitutional Court of RS is the appellate court sitting in judgment on appeals on district courts' decisions.[54]

In the RS entity, the work of prosecutors' services is governed by the Law on Prosecutor's Offices of RS. Besides the Republic Prosecutor's Office of RS, there are also five district prosecutor's offices.[55]

The prosecution of war crimes in Brčko District is under the jurisdiction of the Basic Court of Brčko District. The Appellate Court of Brčko District acts as the second instance court.[56] The Prosecutor's Office of the Brčko District is the body in charged of prosecution of cases before the courts of this district.[57]

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[50] Ibid., Articles 18 and 29.

[51] The work of this service is governed by the Law on the Federation Prosecutor's Office of the FBiH, available at http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=27804. [Visited February 2011]

[52] The work of cantonal prosecutor's offices is regulated by the individual cantonal laws.

[53] Law on Courts of RS, Articles 16, 17, 22 and 25 (Official Gazette of RS No. 111/04, 109/05, 37/06 and 119/08).

[54] Ibid., Articles 18 and 28.

[55]Law on Prosecutor's Offices of RS available at http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=27807. [Visited May 2011]

[56] Law on Courts of Brčko District, Articles 17, 18, 19, 21 and 22 (Official Gazette of Brčko District No. 19/07 and 20/07)

[57] Law on the Prosecutors Office of Brčko District, Article 11 (Official Gazette of Brčko District No. 19/07)

# 3 Criteria in BiH criminal justice system

## 3.1 Large backlog of core international crimes cases in BiH

It is estimated that war in BiH resulted in almost 100,000 human lives lost[58], even greater number of injured and wounded people, enormous property destructions and displaced and refugee persons. In addition, the whole system, including political and judicial infrastructures, was almost destroyed. International as well as domestic efforts to hold accountable those suspected of committing war crimes started before the war ended. At the international level, the ICTY was established by the UN Security Council Resolution 827 the on 25 May 1993 as a response to mass atrocities committed in the territory of former Yugoslavia, with the primary jurisdiction over such crimes. During the war, at the national level, the war crimes prosecutions were conducted by military and civilian courts, but were mostly directed against enemy perpetrators. Moreover, trials were conducted under the political pressure. There were also concerns regarding the lack of evidence.[59] This continued for some time after the war ended.[60] The inability of a domestic system to deal with war crimes prosecutions in an unbiased and fair manner, along side with the prevailing fear of arbitrary arrest prompted further action by the international community. On 18 February 1996, the Rome Agreement was signed between the ICTY and the countries of the region.[61] The Agreement provided for the review mechanism known as the Rules of the Road which allowed the ICTY to supervise the war crimes proceedings carried out by

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[58] Research conducted by the Research and Documentation Center, in Sarajevo under its project "Population Losses in BiH '91 – '95". *Supra* note 24.

[59] Chapter I, Section 3 of *Transitional Justices Guidebook for Bosnia and Herzegovina: Executive* summary, convened by the United Nations Development Programme, Sarajevo, June 2009, http://www.undp.ba/download.aspx?id=1703 [Visited May 2011]. See also Rangelov, Iavor and Theros, Marika. *Maintaining the Process in Bosnia and Herzegovina*, Coherence and Complementarity of EU Institutions and Civil Society in the Field of Transitional Justice. Working Group on Development and Peace (November 2007), p. 4 and onwards.

[60] *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles*. Convened by OSCE Mission to Bosnia and Herzegovina. Sarajevo, March 2005, p. 3 and 4.

[61] See further bellow, Section 3.8.1.

national institutions. In 2003, extensive institutional and legal reforms took place in BiH allowing its criminal justice system to approach war crimes prosecutions in a more responsible and organised manner. As a consequence of the completion strategy of the ICTY, in 2003 the War Crimes Chamber within the Court of BiH was established.[62] Subsequently, the war crimes review process was transferred to the Prosecutor's Office of BiH. The Orientation Criteria Document was adopted in order to assist the Prosecutor's Office in pursuing this task. As of 1 March 2003, the State Court was accorded primary jurisdiction over war crimes cases in BiH.[63] Accordingly, the cases pending before other courts in BiH before the said date fall under the competence of those courts.[64] Thus, it should be noted that according to domestic laws, the jurisdiction for war crimes within BiH criminal justice system is divided between the State and entity level.

More then ten years after the war ended the large backlog of unsolved core international crimes cases in BiH still exists. With a view to solve this issue in a comprehensive and systematic fashion, the Ministry of Justice of BiH has adopted the National War Crimes Strategy in December 2008.[65] One of its objectives is to prosecute the most complex and top priority cases within the 7 year time limit and all other war crimes cases within 15 years of its adoption. The National War Crimes Strategy offers a complete overview of unsolved cases pending before the courts and prosecutor's offices throughout BiH. According to data available up until 1 October 2008 presented in this Strategy, the number of unsolved cases before all courts and prosecutors' offices in BiH was as high as 4990 case files in total. This included 9879 suspected or accused persons. 2409 cases

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[62] For more details, see Court of BiH website www.sudbih.gov.ba [Visited May 2011]

[63] Article 449 of the Criminal Procedure Code of BiH (CPC of BiH); unofficial, consolidated version available at http://sudbih.gov.ba/files/docs/zakoni/en/Criminal_Procedure_Code_of_BH_-_consolidated_version_dec2009.pdf [Visited February 2011]

[64] The possibilities of taking over of a case by the State Court from any lower level court and the transfer of jurisdiction from the State Court to lower level court are provided for in the CPC of BiH.

[65] *National War Crimes Strategy*, December 2008 available at http://www.adh-geneva.ch/RULAC/news/War-Crimes-Strategy-f-18-12-08.pdf, [Visited February 2011]

involving almost half of the alleged perpetrators[66] is pending before the prosecutor's offices of FBiH. The Prosecutor's Office of BiH is about to carry out a slightly smaller amount of this burden. The total number of cases pending before the state prosecutor's office is 1581, including 3819 alleged perpetrators. 927 cases involving 1758 potential perpetrators are pending before judicial institutions of the RS. The least number of cases is pending before judicial institutions of Brčko District that is 76 cases in total, concerning 202 persons.

## 3.2 Limitation of BiH post-conflict system to process core international crimes cases

In situation when many war crimes have been committed with numerous potential suspects and accordingly many case files open, the BiH post-war system was inevitably faced with the dilemma: What is the best way for it to deal with so many open case files in a responsible manner? Taking into account the existing state obligation to search for and prosecute those responsible for such heinous crimes, the question seems to acquire even greater importance.

In the course of the work of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda, it became clear that these courts would only be able to prosecute and punish those who are the most responsible.[67] Other cases would have to be left to national authorities. The consequence of this approach was a shift of the workload from international bodies to relevant national authorities.[68]

In the context of BiH this means that much higher number of cases will be tried before national courts in comparison to cases completed by the ICTY. Already at the time

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[66] More precisely 4099.

[67] During years of their existence these tribunals have concentrated on trying only the most serious cases. Less serious cases have been transferred to relevant national authorities for trial. In this regard see Rule 11*bis* of the Statues of these tribunals.

[68] In his book *International Criminal Law* Antonio Cassese explains the main problems besetting the ICTY and ICTR proceedings. Cassese also puts forward the grounds for, as he calls it a "new trend" of national courts taking over the workload from the international tribunals. See Cassese, Antonio. *International Criminal Law*. Second Edition. Oxford, (Oxford University Press) 2008, p. 340, 341.

of the adoption of the National War Crimes Strategy there were 28 cases (55 Accused) prosecuted before national courts in BiH, while the ICTY concluded proceedings against 124 Accused by January 2011. However, there are several impediments that may jeopardize the whole process of prosecuting core international crimes at the national level.[69]

Core international crimes occurred in such a context when the criminal justice system was not functioning at all or at least not functioning normally and had proven to be biased. A common feature of modern armed conflicts is that they usually entail the failure of democratic institutions and the rule of law, resulting in dysfunctional, biased and an unprofessional criminal justice system. This was the situation in BiH as well.[70] During the conflict, BiH criminal justice system was destroyed and as a consequence, unresolved case files accumulated greatly. Along side with the transition from war to peace, BiH was going thought transition from an authoritarian to democratic regime. The Dayton Peace Agreement proclaimed that BiH shall be a democratic state operating under the rule of law and obliged the state and its entities to ensure respect for human rights and fundamental freedoms.[71] Thus, the democratic and judicial institutions had to be built. In order to be able to fulfil the internationally recognized obligation to try and punish the perpetrators of war crimes, the criminal justice system had to be re-built from the ground up. Many reforms, including institutional and judicial, had to be implemented.[72] And once the system started to deal with the war crimes cases there was already a backlog of cases with different categories of crimes, different gravity, different victimization, seniority, etc. The system was inevitably faced with the problem - how to deal with so many cases?

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[69] Zoglin, Katie. *The Future of War Crimes Prosecutions in the Former Yugoslavia: Accountability or Junk Justice?* Human Rights Quarterly Vol. 27 (2005), p. 46 and onwards.

[70] See generally *Declaration of the Peace Implementation Council*, Madrid, 16 December 1998, paragraph 12; *Final Report of the Independent Judicial Commission, January 2001 – 31 March 2004*, November 2004.

[71] Articles I(2) and II(1) of BiH Constitution.

[72] See more at http://www.ohr.int/ohr-dept/hr-rol/thedept/jud-reform/default.asp?content_id=5227. [Visited February 2011]

Even though the domestic war crimes trials started before the war in BiH was brought to the end, alongside with the fact that the ICTY was established, the large backlog of cases accumulated during years. As stated above, domestic prosecutions were an issue of criticism for many reasons; those were the trials of enemy perpetrators, the lack of evidence which existed, political pressure was high, they raised concerns regarding independency of judges, etc.[73] At the same time, the ICTY was equipped to deal with the limited number of cases. The case review process established under the Rules of the Road Agreement required all the case files to be sent to the ICTY for its review. Once it was decided that BiH was able to conduct trials responsibly, the cases were sent back to BiH authorities who took over the war trials' processes. But at that time, the gap was already created between the time of the commission of the crimes and their prosecution. When the system had been established and the war crimes prosecutions started, the rule of law backlog was formed and a large backlog of cases produced. Months or even years have passed without the proper system functioning entailing non-prosecution of cases. This has created so-called backlog gap. Therefore, a dilemma emerged. How to start the prosecution? Where to start? How to organize the work? "*The existing examples indicate that there is no quick fix of backlog of situations. There is no single remedy that can resolve the problem of large backlog of cases in an immediate and responsible manner.*"[74] Finding responsible and best fitting manner to deal with the accumulated case load was a fundamental challenge to BiH post-war society.

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[73] See for instance case of *Sretko Damjenović against the Federation of BiH*, Human Rights Chamber of BiH, Decision No. CH/96/30, dated 5 September 1997.

[74]Utmelidze, Ilia. *The time and resources required by criminal justice for atrocities and de facto capacity to process large backlog of core international crimes cases: the limits of prosecutorial discretion and independence*. Criteria for Prioritizing and Selecting Core International Crimes Cases. Edited by Morten Bergsmo. Convened by Forum for International Criminal and Humanitarian Law. Oslo, PRIO, 2009 (FICHL Publication Series No. 4 (2009)) p. 134, available at http://www.fichl.org/fileadmin/fichl/documents/FICHL_4_Second_Edition_web.pdf. [Visited May 2011]

## 3.3 The importance for BiH of ensuring that the most suitable cases go to trial first

The scale and severity of atrocities of war placed legal, political and moral responsibility on BiH to take action against the legacy of wartime atrocities and thereby lay foundations for sustainable peace and reconciliation for future generations.

On 16 June, 2008, BiH signed the Stabilisation and Association Agreement clearing the first barrier towards full integration into the European Union within the next decade. Further comprehensive reforms in the judicial sector and overall progress in establishing the rule of law is *sine qua non* for achieving progress towards this goal. The European Union accession places paramount importance to fighting impunity, strengthening the rule of law, as well as to development of justice sector.[75] In this regard, substantial progress has been made. However, the challenge of a large backlog of war crimes cases entails the need for strong strategic vision, political commitments and innovative solutions to this problem.

Several years of efforts in fighting impunity made by international community and domestic actors resulted in the adoption of the National Strategy for War Crimes in December 2008, which sets ambitious objectives to resolve the large backlog of all open war crimes case files within the 15 years time frame. According to this document, the backlog is to be resolved by the use of the selection and prioritization criteria that would ensure that the most serious cases are processed within 7 years and all other cases within 15 years from the adoption of the Strategy.[76] There are several aspects that underlie the importance of ensuring that these strategic goals are implemented. In many instances, the international community and the ICTY itself have stressed the importance of domestic war

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[75] *Council decision on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina repealing Decision 2006/55/EC*, 2008/211/EC, Brussels, 18 February, 2008; *An Agenda For Reform Agreed Between the Government of Bosnia and Herzegovina and the International Community*, A Message to The People of Bosnia and Herzegovina, The Rule of Law. Office of the High Representative, Peace Implementation Council, October 4, 2002, available at http://www.ohr.int/pic/default.asp?content_id=28072. [Visited February 2011]

[76] National War Crimes Strategy, p. 4.

crimes prosecutions.[77] The war crimes prosecutions in BiH are the precondition for full transition into a democratic society and BiH's progress on its way to European integration. They are recognized as the first step in facing the past.[78] The role of war crimes prosecutions is recognized in rule of law rebuilding process in post-conflict BiH. This is essential to ensure the strengthening of domestic judicial capacity. The existence of an independent and efficient judiciary that enjoys the confidence of the citizens is the pre-condition for building a democratic and just society.

By processing those that are the most responsible as a priority, BiH will show its determination not to shield the masterminds of the crimes committed during the war. This is important for the perceptions of the domestic and international audience. BiH's determination to hold accountable all those responsible will allow facing its past maturely and turning to the future without unresolved issues of such importance that may jeopardize its development.

### 3.4 Steps taken in BiH to ensure that most suitable cases go to trial first or before it is too late?

Ideally, any criminal justice system faced with past atrocious crimes should design a plan specifying the approach addressing the large backlog of core international crimes cases. A clear and strong determination of BiH criminal justice system to deal with the past atrocities is undisputable. However, 15 years have passed after the war ended in BiH. In such a long period of time some relevant material evidence may have disappeared. In addition, witnesses who are the most used type of evidence in war crimes trials in BiH, may have passed away. Therefore, BiH authorities decided to address the large caseload of war crimes cases by the adoption of case selection and prioritization criteria.

In August 2004, the Chief Prosecutor of the ICTY transferred the review process to the Prosecutor's Office of Bosnia and Herzegovina.[79] In order to be able to conduct this process the Collegium of BiH Prosecutors adopted the "Orientation Criteria for Sensitive

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[77] See http://www.icty.org/sections/Outreach/CapacityBuilding. [Visited February 2011]

[78] National War Crimes Strategy, p. 3.

[79] Article 2(4) and (5) of The Book of Rules on the Review of War Crimes Cases.

Rules of the Road Cases" with the purpose "to assist the Prosecutor's Office of Bosnia and Herzegovina with the selection of cases to be heard before the Special War Crimes Chamber of the Court of Bosnia and Herzegovina"[80].

Later on, in December 2008 the National War Crimes Strategy adopted the case selection and prioritization criteria against which all war crimes cases have to be measured with a view to assign the cases to an appropriate forum that is to differentiate among cases to be tried before the State Court and other courts within BiH. The most complex cases should be processed before the Court of BiH. Other cases that are deemed to be less complex are to be tried at the courts of Federation, Republic of Srpska or Brčko District. Moreover, the criteria also play a role in making a strategic decision on the priority of certain cases among others.

## 3.5 Case selection and prioritization criteria in BiH came as a logical choice in light of the ICTY experience

It seems that the BiH criminal justice system took the desirability of criteria for case selection and prioritization for granted. The institutions concerned decided to follow the approaches taken by the international courts, namely the ICTY and ICC and their practices and to adopt the criteria as a tool designed to address the large war crimes caseload. Thus, they skipped the question of the criteria's desirability and proceeded straight to formulation and articulation of the content and specifics itself. Other criminal justice systems have opted for other methods of dealing with the past, such as Gacaca trials in Rwanda or the Truth and Reconciliations Commission in South Africa.

However, given the specific post-war realities, constitutional and political specificities of BiH society the case selection criteria seemed as normal and natural way to follow. From the time the war ended, BiH development, as noted in the previous Chapter, is marked and measured by the level and power of international influence in so many respects. The war crimes prosecution process itself was seriously triggered when the international community decided to create the ICTY. After the ICTY completion strategy

[80] Section 1, first paragraph, Orientation Criteria for Sensitive Rules of the Road Cases.

was introduced, Bosnian domestic war crimes prosecutions were the natural follow up mechanism with the international community having a considerable role.[81] In light of these circumstances, both the jurisprudence of the ICTY as well as its methods of selecting cases became a model for domestic prosecutions. In years after the war, many laws were imposed by the High Representative including some important provisions concerning war crimes cases.[82] Similarly, the National War Crimes Strategy project was supported by the international actors in BiH. Staff members of the OSCE and Office of the High Representative participated in the Working Group meetings where the Strategy was negotiated. In my view, these specific circumstances surrounding BiH post-conflict development taken together with the strong determination to deal with the war crimes cases within its criminal justice system may be seen as an explanation why the desirability of the criteria was not disputed as such by the local legal community. The local actors concerned tried to formulate the criteria that would suit best to the BiH criminal justice system and to find a solution as how to include them in the legal framework with the intention to make them applicable in practice.

### 3.6 The role of criteria in the selection and prioritization of core international crimes in BiH

The main objective set by the Strategy is to prosecute:

- the most complex and top priority war crime cases within the period of seven years from the time of adoption of the Strategy and

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[81] Article 24 of the Law on Court of BiH allows for the appointment of international judges. In the beginning of the war crimes prosecutions, the first instance panels at State Court of BiH in war crimes cases were composed of two international and one national judge. After the initial phase, all international judges should be replaced with nationals. The Registry was in charge for providing the support and coordination of this process. See *Project Implementation Plan, Registry Progress Report*, Office of the High Representative, 20 September 2004, p. 3 and onwards, available at http://www.ohr.int/ohr-dept/rule-of-law-pillar/pdf/wcc-project-plan-201004-eng.pdf. [Visited February 2011]

[82] For instance, provision on the length of custody after pronouncement of verdict. These amendments to the Criminal Procedure Code were imposed by the High Representative. See amendments of Article 138, Official Gazette of BiH, No. 16/09.

- all other war crimes cases within the period of fifteen years of its adoption.

For this purpose the case selection and prioritization criteria have been developed and they form an integral part of the War Crimes Strategy as its Annex A. They serve as guidelines for the Prosecutors Office of BiH and the Court of BiH in determining whether a particular case should be prosecuted at the state or entity/Brčko District level. The intention of the drafters of the Strategy and the determination of the State of BiH is clearly stated: the most complex cases are to be tried before the Court of BiH. The case complexity is the criterion for the appropriate forum selection.

In this light, it is necessary to distinguish between two groups of cases dealt with by the Strategy. According to Article 449(1) of the Criminal Procedure Code of BiH (CPC of BiH) that entered into force on March 1, 2003[83] all war crimes cases that are initiated after the stated date fall under the exclusive jurisdiction of the State Court. In accordance with Article 27 of the CPC of BiH, which provides for the transfer of jurisdiction, these cases may be transferred to other courts in the entities or Brčko District by a decision of the State Court (at the request of the parties or *proprio motu*). These cases fall under the first group of cases differentiated by the Strategy – group I cases.

Second, more numerous, group of cases consists of war crimes cases that were pending before courts other then the Court of BiH prior to entry into force of the CPC of BiH (March 1, 2003) – group II cases. Pursuant to Article 449 the entity and district courts which have territorial jurisdiction are under the obligation to finalize these cases, except when the Court of BiH decides to take over such a case. The State Court has the possibility to take over a case from this category, by way of a procedural decision, either on its own initiative or upon request of the parties.

Until 1 October 2008, the Prosecutor's Office of BiH had 565 cases classified under the first group. At the same time 146 cases falling under the second group had been taken over by a decision of the State Court, pursuant to Article 449, and will be handled by the Prosecutors Office of BiH.

[83] Official Gazette of BiH, No. 3/03. See supra note 63.

Certain amendments to the existing criminal legislation were necessary in order to make prosecution of the most complex cases before the State Court applicable in practice. In that regard, Articles 27 and 449 of CPC of BiH were amended in November 2009, incorporating main elements of the selection criteria (Annex A of the Strategy), as legal reasons for decisions on take over or transfer of jurisdiction.[84]

Before these amendments, the transfer of jurisdiction as provided for in Article 27 of the CPC of BiH was possible only if there are "strong reasons" justifying it.[85] Having strong civil law origins, judges in BiH were generally keen to interpret the law strictly. Traditionally the legal standard of "strong reasons" was read to mean for instance that the transfer of a case would be justified if conducting the trial before the State Court would involve enormous costs of the proceedings, or unnecessary lost of time. These interpretations thus include consideration on where the proceedings would be more easily and effectively conducted.[86]

With an intention to make Article 27 a functioning mechanism for the transfer of jurisdiction an additional article, namely Article 27a is added to be applied only to war crimes cases. This amendment incorporates significant improvements. The transfer of jurisdiction may be justified by the reference to criteria, *i.e.* "the gravity of criminal the offence", "the capacity of the perpetrator" and "other circumstances of importance" instead of ineffective and obsolete "strong reasons" legal standard contained in Article 27.[87]

As indicated above, there are much more cases falling under the group II cases differentiated by the Strategy, in comparison to group I. These are the cases under the jurisdiction of cantonal and district courts. Some of these cases were subjected to the review by the Prosecutors Office of BiH, prior to the adoption of the Strategy, using the Orientation Criteria, and were found to be "very sensitive" thus requiring the trial before

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[84] See Articles 27 a and 449 of the CPC of BiH as amended in November 2009, Official Gazette of BiH No. 93/09.

[85] Ibid.

[86] See for instance *Decision on transfer of jurisdiction*, Case No. X-KRN/06/222 against Boro Milojica, Court of BiH, 28 August 2006.

[87] Article 27a.

the Court of BiH. Subsequently, 136 such cases were taken over by the State Court pursuant to Article 449(2) of CPC BiH. However, the majority[88] of group II cases has never been subjected to such a review since the territorially competent courts were not under any obligation to inform the Court of BiH about these kind of cases which leaves the State Court without any insight into those cases. Thereby, the possibility of the Court of BiH to take over such a case *ex officio* was made practically impossible. Hence, it is very likely that at least some of group II cases are of such complexity that requires the prosecution at the state level. For these reasons, the Strategy imposed obligations on the prosecutor's offices throughout BiH to inform the State Court on their caseload. Additionally, it formally introduced selection criteria – Annex A (previously covered by internal rules of the Prosecutors Office of BiH - Orientation Criteria) and called for amendments of Article 449 to include them.[89] Subsequently, Article 449 was amended in November 2009[90] and the reference to the main features of Annex A selection criteria: "the gravity of criminal offence", the "capacity of the perpetrator" and "other circumstances of importance", was included therein, to guide the assessment of the complexity of cases for the purpose of taking them over. In addition, the Strategy also clearly instructed the entity prosecutor's offices and the Prosecutors Office of Brčko District to provide the Court of BiH with the data on number of cases within their jurisdiction and with enough details so as to allow the Court to take them over *ex officio* if the complexity so requires.

It bears to note what is clearly spelled out by the adopted amendments. Namely, the intention of the Strategy drafters was to strengthen the role of judges in the war crimes cases review process. With the recent amendments of November 2009, the judges form an indispensible part of selection and prioritization of cases agenda.

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[88] According to the Strategy, up until 1 October 2008, there were 1216 such cases in total.

[89] It should be noted that the selection criteria adopted by the Strategy (Annex A) are called „case complexity criteria" while the previously existing criteria used by the Prosecutor's Office of BiH were called „sensitivity criteria". The difference in terminology here is not of importance, given that both sets of criteria refer to the same substantive elements, and that the Strategy criteria practicaly substituted the orientation criteria, making them formaly part of the National Strategy on War Crimes and subsequently introducing them into relevant legal provisions of the CPC. It would seem that this was just a matter of choice in terminology.

[90] Official Gazette of BiH, No. 93/09.

## 3.7 Some criteria in the work of the ICTY and ICC

### 3.7.1 The ICTY

"[T]he United Nations Security Council[91] set up ad hoc Tribunals pursuant to its power to decide on measures necessary to maintain or restore international peace and security… "[92]. This was the first time that the UNSC took such a measure acting on the strength of Chapter VII[93] of the United Nations Charter.[94] By its resolution 827 the UNSC established the ICTY on 25 May 1993. The UNSC decided to:

> establish the international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace.[95]

The ICTY was given very broad mandate. Article 1 of the ICTY Statute, says that:

> The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.[96]

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[91] Hereinafter: UNSC

[92] Cassesse, Antonio. *International Criminal Law*. Second Edition. Oxford, (Oxford University Press) 2008, p. 325

[93] Articles 39 and 41 of the UN Charter.

[94] In this regard see UNSC Resolution No. 955 (1994), S/RES/955 (1994), 8 November 1994 available at http://www.un.org/ictr/english/Resolutions/955e.htm [visited May 2011]

[95] Paragraph 2 of UNSC Resolution No. 827 (1993), S/RES/827 (1993), 25 May 1993 available at http://www.un.org/Docs/scres/1993/scres93.htm [visited May 2011]

[96] ICTY Statute available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [visited May 2011]

In the initial phase of the Tribunal's work the case selection and prioritization was mainly governed by the availability of evidence and particular interests of individual prosecutors in a certain case.[97] It seems that in the beginning of the Tribunals functioning the position and level of responsibility of the perpetrator was not a key factor for the case selection. This is apparent from the selection of its first case, *Prosecutor v. Duško Tadić*[98]. As Carla Del Ponte described in her article:

> Although the crimes committed by Duško Tadić were indeed horrific and despicable in themselves, it is still probably true that this convicted man is not among those most responsible for the crimes committed in the former Yugoslavia.[99]

This may easily be the consequence of the fact that the criteria are not contained in the ICTY Statute or in the Rules on Procedure and Evidence[100] (RoPE). Neither document contains a list of case selection standards or guidance as how to organize such a selection.

#### 3.7.1.1 Specific criteria in the ICTY

In October 1995, the ICTY Office of the Prosecutor (ICTY OTP) adopted a document containing a set of criteria for selection of cases. Its purpose was to enable an effective allocation of the Tribunals resources and to facilitate the fulfilment of its mandate.[101] The criteria included in the 1995 Document were divided into five groups: "(a) the person to be

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[97] See Bergsmo et al., *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Oslo, PRIO, 2009 (FICHL Publication Series No. 3 (2009)) p. 70.

[98] Case No. IT-94-1.

[99] Del Ponte, Carla. *Prosecuting the Individuals Bearing the Highest Level of Responsibility*, 2 Journal of International Criminal Justice (2004), p. 516

[100] Availabe at http://www.icty.org/sections/LegalLibrary/RulesofProcedureandEvidence. [Visited February 2011]

[101] Bergsmo et al., *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Oslo, PRIO, 2009 (FICHL Publication Series No. 3 (2009)) p. 68., 69.

targeted for prosecution; (b) the serious nature of the crime; (c) policy considerations; (d) practical considerations; and (e) other relevant considerations".[102]

In 1998, debate on criteria emerged again in the ICTY. Louise Arbour who was the Chief Prosecutor at the time, in her internal memorandum pointed out that only a small number of alleged perpetrators who were indicted before the Tribunal were persons with leadership responsibility. The Chief Prosecutor's decision to withdraw the indictments against 14 low-level accused in the Omarska and Keraterm cases showed that the OTP's charging policy significantly changed. In the press release of 8 May 1998 she explained her decision and confirmed that the overall strategy of her Office was to concentrate on those who bear the highest level of responsibility or those who have been personally responsible for the extremely brutal and serious offence.[103]

In 2000, the UNSC adopted the Resolution approving the proposal of the ICTY President to create a pool of *ad litem* judges.[104] By this Resolution the UNSC also took note "of the position expressed by the International Tribunals that civilian, military and paramilitary leaders should be tried before them in preference to minor actors".[105] This was the first of the UNSC resolutions on the so-called "completion strategy" of the ICTY.[106] In this regard, it bears mentioning two additional UNSC resolutions, namely 1503 and 1534 from 2003 and 2004 respectively[107] whereby the UNSC reaffirmed that the ICTY should concentrate "on the prosecution and trial of the most senior leaders suspected of being most

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[102] For the content of the each group of criteria see Ibid., p. 69 – 73.

[103] "*Statement by the Prosecutor following the withdrawal of the charges against 14 accused*", ICTY Press Release, available at http://www.icty.org/sid/7671. [Visited May 2011]

[104] The letter of the President of the ICTY addressed to the UNSC contained the strategy for completion of all first instance trials until the end of 2007, UNSC Press Release No. SC/6879, 20 June 2000, available at http://www.un.org/News/Press/docs/2000/20000620.sc6879.doc.html. [Visited January 2011]

[105] UNSC Resolution No. 1329 (2000), S/RES/1329 (2000), 5 December 2000, seventh preambular paragraph.

[106] Dominic Raab, *Evaluating the ICTY and its Completion Strategy*, 3 Journal of International Criminal Justice (2005), p. 85.

[107] UNSC Resolution No.1503 (2003), S/RES/1503(2003), 28 August 2003 and UNSC Resolution No.1534 (2004), S/RES/1534(2004), 26 March 2004.

responsible"[108] for crimes within its jurisdiction. Subsequently, the judges of the ICTY amended Rule 28(A) of the RoPE in 2004 thereby allowing for the review of the indictment in order to examine whether it concentrates on the level of responsibility criterion as specified in the UNSC Resolution referred to above.[109]

In sum, the 1995 Document contains very broad list of relevant criteria to be considered when deciding whether to try a case before the ICTY. Although it had little impact on the early selection policy of the ICTY, as shown above, the value of this document should be seen in the light of the ICTY being some kind of an experiment with international criminal justice in the early 1990s. Its value is recognized in the creation of the selection criteria in BiH which is heavily influenced by the ICTY criteria.

As regards the 1998 Prosecutor's decision, contained in the press release issued in May, notwithstanding the fact that it did not contain the actual criteria, but rather formed the guidelines for prosecutorial accusation action, its importance may be seen best in crystallizing the level of the responsibility or seniority of the accused as a crucial element in the case selection process.

### 3.7.2 The ICC

As the first permanent international criminal institution, the importance and the content of criteria in the work of the ICC must be analyzed through the prism of that outstanding function and the very purpose of its creation – to put an end to impunity for the perpetrators of such serious crimes that are of concern to the whole international community.[110] The ICC has jurisdiction over "the most serious crimes", as defined by the Statute,[111] that are of

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[108] See seventh preambular paragraph of UNSC Resolution No. 1503 (2003) available at http://www.un.org/Docs/sc/unsc_resolutions03.html . [Visited May 2011]

[109] Rule 28(A) of the ICTY RoPE.

[110] ICC Statute, preamble paragraphs 4 and 5.

[111] Article 5 of the ICC Statute in relation prembular paragraph 9. Article 5 lists crimes that fall under the jurisdiction of the court: genocide, crimes against humanity, war crimes and aggression (for this crime the Court is to exercise its jurisdiction once the definition is adopted).

"sufficient gravity"[112] to substantiate its action. The ICC is global in nature, since its territorial jurisdiction is not limited to a certain conflict or area. The Court may investigate and prosecute crimes committed in different countries. This trait makes it significantly distinct from other international courts, since their jurisdiction is limited to a certain conflict as is the situation with the two *ad hoc* tribunals ICTY and ICTR.[113] Thus, the case selection and prioritization criteria may play a crucial role in the work of the ICC.

#### 3.7.2.1 The ICC Statute

The Statute itself provides for the criteria that the Prosecutor has to take into account when deciding on the initiation or continuation of an investigation. In order to initiate an investigation, Article 53(1) prescribes that the Prosecutor must consider three elements: whether the information available provides a reasonable basis to believe that a crime falling under the ICC jurisdiction has been or is being committed;[114] whether the admissibility requirements specified in Article 17 of the Statute are satisfied;[115] and whether there exist "substantial reasons to believe that an investigation would not serve the interests of justice", taking into consideration "the gravity of the crime and interests of victims".[116] Similarly, Article 53(2) stipulates the factors to be considered in determining whether a certain investigation provided sufficient basis to proceed with prosecution: whether the "legal or factual basis" is sufficient to seek a warrant or summons pursuant to Article 58; other two elements are the same as in Article 53(1)(b) and (c) respectively, with the only exception that 53(2)(c) unlike 53(1)(c) refers to "all the circumstances" to be taken into consideration.[117] There are some limitations to prosecutorial discretion in the case selection

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[112] In this regard see Article 17 (1)(d) of the ICC Statute that proclaims inadmissible cases of insufficient gravity.

[113] Articles 8 and 7 of the ICTY and ICTR Statutes respectively.

[114] Article 53(1)(a) ICC Statute

[115] Article 53(1)(b) ICC Statute

[116] Article 53(1)(c) ICC Statute

[117] Article 53(2)(c) suggests the circumstances to be taken into account when deciding whether to continue with an investigation: gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.

and prioritization. The decision of the Prosecutor based on 53(2)(c) and 53(1)(c) [118] is subject to review by the judges of the Pre-Trial Chamber.[119] The judicial review of prosecutorial selection decision is important for the appearance that this decision is not arbitrarily made.

In sum, not each and every situation brought before the ICC Prosecutor will be formally investigated. After having concluded that the situation is such that involves crimes under the jurisdiction of the Court, the Prosecutor has an important task to determine whether the case is of sufficient gravity to proceed with prosecution. This includes considerations of complementarity, as described in Article 17 of the ICC Statute[120], and gravity (its components are disused further bellow).

#### 3.7.2.2 Policy papers by the Office of the Prosecutor

Several public documents are worth analyzing in the case selection criteria context: Paper on some policy issues before the Office of the Prosecutor of September 2003[121], draft policy paper on "Criteria for selection of cases and situations" of June 2006[122], the ICC OTP's Report on the activities performed during the first three years (June 2003 – June

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[118] Ibid., Article 53(3) and 19(1)

[119] In this regard it is interesting to see developments in the case the Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04. The gravity test was an issue before the Pre-Trial and Appellate Chamber of the ICC. See particularly *Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"*, 13 July, 2006, para. 54.

[120] The ICC is not meant to replace for the national courts, but instead to act only when and if a state is unwilling or unable to conduct investigation and/or proceedings genuinely. For discussion on complementarity, see also Cassese, Antonio. *International Criminal Law*. Second Edition. Oxford, (Oxford University Press) 2008, p. 342. and onwards.

[121] Available at http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf. [Visited February 2011]

[122] The content of this document is presented in article by Seils, Paul, *The selection and prioritization of cases by the Office of the Prosecutor of the International Criminal court*, Criteria for Prioritizing and Selecting Core International Crimes Cases, Oslo, PRIO, 2009 (FICHL Publication Series No. 4 (2009)) p. 55. – 58.

2006) dated 12 September 2006[123] and the Policy Paper on the interest of Justice of September 2007[124]. The policy paper of September 2003 suggests that the OTP's intention is to concentrate its activities on those bearing the greatest degree of responsibility. [125] Furthermore, the Document recognizes the problem of "practical realities" the Prosecutor might face, such as witness protection issues, security questions and availability of means of investigation.[126] The aim is to employ such a strategy that would allow the Court to use its potentials to the maximum while at the same time recognizing the need to use its limited resources most efficiently. Accordingly, the importance of conducting expeditious and focused proceedings is acknowledged.

The draft policy paper on the "Criteria for selection of cases and situations" of June 2006 added some clarification to the gravity standard announced already in 2003 as the prosecutorial guiding standard in case selection. The assessment of gravity of a case involves consideration of the following relevant factors: nature of the crime, its scale taking into account the number of victims and its intensity (temporal and geographical), the manner of commission of the crime in question as well as its impact on the affected communities.

The ICC OTP's first three year Report did not add much to what was already proclaimed in the previous documents. It restated its strategy to concentrate activities on those who bear the greatest responsibility and reiterated main elements that form part of the gravity threshold considerations requited to support further Court's action.

The Policy Paper on the Interest of Justice lists three elements relevant for case selection determination. Firstly, the gravity of the crime is described with reference to higher gravity considerations set forth in Article 17(1)(d) as a part of admissibility test. It is

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[123] Available at http://www.icc-cpi.int/NR/rdonlyres/66FF6FBA-3FA7-48CD-AE97-2FD6865FF596/248466/372623.PDF. [Visited February 2011]

[124] Available at http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf. [Visited February 2011]

[125] Page 7 of the Document.

[126] Ibid., Page 2

reiterated that the gravity is measured by the scale of the crimes, their nature, the manner of their commission and the impact on affected communities. The second criterion for case selection that is the interests of victims "includes the victims' interest in seeing justice done, but also other essential interests such as their protection"[127]. "The particular circumstances of the Accused" is the last criterion suggested by the Paper. As indicated above the OTP previously declared its strategy to focus on those who bear the highest responsibility. In this regard, the Paper catalogues factors to be taken into consideration when determining the most responsible ones in the following words:

> [T]he alleged status or hierarchical level of the accused or implication in particularly serious or notorious crimes. That is, the significance of the role of the accused in the overall commission of crimes and the degree of the accused's involvement (actual commission, ordering, indirect participation).[128]

## 3.8 Criteria in the BiH criminal justice system

### 3.8.1 The "Orientation Criteria" of the Collegium of Prosecutors of Bosnia and Herzegovina

On 18 February 1996 the Rome Agreement was signed between the ICTY and the countries of the region.[129] Based on the Part 5 of the Rome Agreement the Rules of the Road procedure was developed. This mechanism enabled the ICTY to supervise the war crimes processes conducted by domestic authorities. In accordance with the Agreement, the Rules of the Road Unit was formed within the ICTY OTP. The signatories agreed that the ICTY Prosecutor "*would review domestic war crimes investigations in order to advise*

[127] See page 5 of The Policy Paper on the Interest of Justice.

[128] Ibid., Page 7

[129] Supra Section 2.1.

*whether or not the evidence was sufficient by international standards to justify either the arrest or indictment of a suspect or continued detention*"[130].

The Rules of the Road obliged judicial authorities in BiH to deliver all files referring to investigated war crimes cases to the Rules of the Road Unit for assessment.[131] Therefore, all case files that existed at the time were sent to the ICTY, as well as the cases that were opened in the period after the conclusion of the Rome Agreement until 2004, when the Unit ceased to exist.[132] The Rules of the Road Unit reviewed a significant number of cases. The assessment depended on the evidence in the case file being enough to substantiate prosecution.[133] All reviewed files were classified into seven categories on a descending scale with different standard markings from "A" – where evidence was sufficient to provide reasonable grounds for believing that the person who is the subject of the report has committed a serious violation of international humanitarian law, to "G" – when evidence was not sufficient.[134]

On 27 August 2004, the Prosecutor's Office of BiH took over the review of war crimes cases.[135] In order to be able to conduct this process, on 12 October 2004, the Collegium of BiH Prosecutors adopted the Book of Rules which set out the "conditions and arrangements"[136] for the war crimes review process. "Orientation Criteria for Sensitive Rules of the Road Cases" are annexed to the Book of Rules document.

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[130] Article 2(1) of the *Book of Rules on the Review of War Crimes Cases*, adopted by the Collegium of Prosecutors of Bosnia and Herzegovina on December 28, 2004.

[131] See Chapter I, Section 3 of *Transitional Justices Guidebook for Bosnia and Herzegovina: Executive summary.* Convened by United Nations Development Programme. Sarajevo, June 2009, http://www.undp.ba/download.aspx?id=1703. [Visited May 2011]

[132] Mujkanović, Zekerija. *"The Orientation Criteria Document in Bosnia and Herzegovina"*, Criteria for Prioritizing and Selecting Core International Crimes Cases, Forum for International Criminal and Humanitarian Law Publication Series No. 4, Oslo (International Peace Research Institute) 2009. pp. 64.

[133] Article 2(2) of the Book of Rules.

[134] Ibid.

[135] Article 2(4) and (5) of the Book of Rules.

[136] Ibid, Article 1.

#### 3.8.1.1 Scope and application of the Orientation Criteria

The purpose of the criteria is "to assist the Prosecutor's Office of Bosnia and Herzegovina with the selection of cases to be heard before the Special War Crimes Chamber of the Court of Bosnia and Herzegovina"[137]. The Document gives preference to trying the war crimes cases before the lower courts since the Court of BiH "will have neither resources nor the time to try all the war crimes cases"[138].

The Orientation Criteria document divides all cases into two categories: Category I - "highly sensitive" and Category II - "sensitive" cases. The first group of cases must be tried before the Court of BiH, whereas the second group may as well be tried before lower level courts.[139]

The criteria are designed to function on two levels. Firstly, they are used in order to select the cases to be tried on different jurisdictional levels, namely the State Court and District/Cantonal courts. Moreover, they function as the criteria for prioritizing the cases once the appropriate forum has been decided, that is prioritizing cases within a specific court.

For both categories of cases, Category I and II, the criteria are divided into three groups: 1) "Nature of Crime alleged ('Crime')", 2) "Circumstances of alleged perpetrator ('Perpetrator')" and 3) "Other Considerations ('Other')". Under the first heading the offences for both categories of cases are listed. The list is rather broad and includes various protected values. It includes the offences against persons as well as against property.[140] The Criteria under the second group titled "Perpetrator" are quite broad. They include not only past and present military and civilian leaders, but also paramilitary, police and judicial authorities. There is also a reference to the notoriety of a potential suspect and multiple rapists. It should be noted that the lists do not refer to any mode of liability or any form of

[137] Section 1, first paragraph, Orientation Criteria for Sensitive Rules of the Road Cases.

[138] Ibid., second paragraph.

[139] Section 2, second paragraph, Orientation Criteria for Sensitive Rules of the Road Cases.

[140] Section 2, Orientation Criteria for Sensitive Rules of the Road Cases.

participation in a criminal offence, but solely to the hierarchical positions and roles of potential perpetrators.[141]

In the closing paragraph of the Orientation Criteria Document a very important statement regarding the prioritization of cases is made. It states that there may be a necessity "to prioritize cases depending upon the stage of the investigation and whether individual cases are ready to proceed". The text continues by recognizing the criterion of "readiness to proceed" with a case as a criterion for case prioritization. The paragraph ends with a general guideline for prioritization of cases, which may be made based on the examination of the following aspects: command responsibility as mode of liability of a suspect, offences committed by a public official who are still in office and crimes committed by law enforcement officials.

### 3.8.2 National War Crimes Strategy

In December 2008, the Ministry of Justice of BiH adopted the National War Crimes Strategy.

There are several reasons for which the Strategy was initially drafted. First of all, there is a great number of unsolved war crime cases.

Secondly, establishing a centralised record of all war crime cases in the BiH judiciary is necessary. This is a prerequisite for efficient future prosecution planning.

Third reason is lack of a harmonized judicial practice in war crimes cases throughout BiH courts.[142] The most significant aspect of this problem is application of different substantive laws applicable to war crime cases. Namely, the State Court of BiH applies the new Criminal Code of BiH enacted in 2003 when trying war crimes cases. On the other hand, the entity courts have different legal standing on this matter. They apply the

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[141] Bergsmo et al., *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Oslo, PRIO, 2009 (FICHL Publication Series No. 3 (2009)) p. 61.

[142] See generally *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina*. Convened by OSCE Mission to Bosnia and Herzegovina. Sarajevo, August 2008. Available at http://oscebih.org/documents/12615-eng.pdf. [Visited February 2011]

substantive law that was in force at the time of the commission of war crimes, that is the Criminal Code of Federal Republic of Yugoslavia. From the human rights point of view, the problem may lead to grave human rights concerns. As a consequence, constitutional principles of legal certainty and equality before law may be seriously infringed.[143] The Strategy calls for some legal amendments to address this issue.

Deficiencies in the management of war crime cases are named as the fourth *rationale* for drafting the Strategy. The last two motivations underlying the Strategy making are the fact that the regional co-operation with regard to war crime cases has not been on a satisfactory level[144] and the support and protection of witnesses and victims in war crime proceedings within BiH's judicial system is not sufficient.[145]

In relation to the Orientation Criteria, which was an internal document of the Prosecutor's Office, the Strategy offered a way to integrate their essence into legal provisions governing the distribution of cases amongst different jurisdictions in BiH. The criteria adopted in the Strategy, largely based on the Orientation Criteria, through legal amendments of the relevant provisions of the CPC of BiH, became the official mechanism to which judges can refer when transferring cases, thereby harmonising the then existing practice in case selection and prioritization.

#### 3.8.2.1 The specific criteria developed by the Strategy

The Strategy states that the most complex cases from both groups (see Section 3.8.1.1 above) should be processed before the Court of BiH. Less complex cases are to be tried at the lower courts. This would be ensured by the transfer mechanism and the mechanism of take-over of cases (provided for in articles 27 and 449 of the CPC of BiH) which both incorporate the complexity criteria as defined in the Strategy.[146] The features of the "gravity of the criminal offence" criterion, "the capacity and role of the perpetrator"

[143] The Constitutional Court of BiH decided in favour of the application of the new Criminal Code. For more details see *Abduladhim Maktouf, Decision on admissibility and merits*, Case No. AP 1785/06, Constitutional Court of BiH, 30 March 2007.

[144] National War Crimes Strategy, p. 4

[145] Ibid.

[146] Amendments to the CPC of BiH of November 2009.

criterion and "other circumstances" criterion are listed in Annex A of the Strategy. All war crimes cases have to be measured against these criteria with a view to assign the cases to an appropriate forum *i.e.* to differentiate among cases to be tried before the State Court and other courts having jurisdiction. Moreover, the criteria also play a role in determining the priority of a certain case among others. These criteria are based on those stipulated in the Orientation Criteria Document of the Collegium of BiH Prosecutors, as well as the relevant documents and the case law of the ICTY and ICC.

Pursuant to the Strategy, the role of criteria is multiple. Firstly, they serve as a guiding instrument for the Prosecutor's Office of BiH when submitting a proposal to take over a case (in accordance with Article 449(2) of the CPC of BiH) or for the transfer of jurisdiction (in accordance with Article 27a of the CPC of BiH) by the Court of BiH. Secondly, in order to request a taking over of a case in accordance with Article 449(2) of CPC of BiH, all lower level prosecutors' offices and courts should justify the motions by the use of criteria. Finally, by measuring war crimes cases against the stated criteria, the Court of BiH is in position to decide *proprio motu* or on the proposal of the parties, whether a case should be prosecuted before the Court of BiH or alternatively at the entity/district level. This novel and important possibility of the Court itself to take part in the selection/distribution process is, in my view, influenced by the role accorded to judges in the ICTY and ICC. The Orientation Criteria Document did not provide for such possibility. This has changed with the adoption of the Strategy. Accordingly, Articles 449 and 27 of the CPC of BiH were amended by inclusion of the criteria therein which allowed for more active role of the judges in the implementation of the criteria.[147] The judges of the Court of BiH are now the ones who, by the application of criteria, decide on the complexity of a case, as opposed to the Orientation Criteria that were not binding for the Court as such since they were part of an internal prosecution document. According to the data available to the author at present, in 2010 there have been 63 decisions[148] in which the Court applied the criteria from the Strategy, referring to the newly adopted Article 27a of the CPC of BiH.

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[147] Official Gazzete of Bosnia and Herzegovina, No. 93/09.

[148] E-mail conrespondence with the Head of the Court Menagement Section in December 2010.

In its decisions rendered in accordance with Article 27a, the State Court refers not only to the criteria stipulated in Article 27a, but also to their essence as detailed in the Annex A of the Strategy. Cases with accused persons having no command responsibility, less grave consequences of the crime and without any need of protective measures for witnesses were transferred to lower courts for prosecution.[149] On the other hand, the transfer of cases involving accused persons who were commanders in military, paramilitary or police establishment was rejected by the Court.[150] In addition, the fact that there is a need for protective measures for witnesses, even if it is only one witness was the reason for rejecting the motion for transfer of jurisdiction.[151] It seems that the criteria are being more or less equally applied to all cases, which should positively influence the overall war crimes prosecution process. This will most probably ensure that the most complex cases are tried as a priority and before the appropriate forum, in this case Court of BiH. This undoubtedly enhances the chances of BiH judiciary to accomplish the goal set forth by the Strategy.

#### 3.8.2.2 Comparison of some criteria of domestic and international institutions

By comparing domestic and international approaches to criteria many similarities, but also certain discrepancies in their perception may be noted. This is understandable due to different circumstances that have led to their adoption. Particular conditions in which these judicial mechanisms operate cannot be underestimated. The ICTY and ICC unavoidably have to cope with the demanding task of picking only those cases that are the most suitable for international prosecution. Certain difficulties registered in this process have to be recognized, especially regarding the ICTY, since it was accorded a broad mandate and primacy over national jurisdictions concerning core international crimes. In the beginning of its work, it lacked a clear prosecutorial strategy. Only later, with the introduction of the

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[149] See, for instance, *Decion of the Court of BiH on transfer of jurisdiction* in cases: Case No. X-KRO-07/476 dated 8 June 2010, Case No. X-KRO-07/433 dated 1 September 2010, Case No. X-KRO-09/673 dated 22 November 2010.

[150] See *Decision of the Court of BiH on transfer of jurisdiction*, Case No. X-KRO-07/428 dated 28 June 2010.

[151] See *Decision of the Court of BiH on transfer of jurisdiction*, Case No. X-KR-10/948 dated 19 July 2010.

completion strategy, it became clear that it should focus "on the prosecution and trial of the most senior leaders suspected of being most responsible"[152]. It is warranted to repeat the Rules of the Road procedure established by the Rome Agreement in 1996. Pursuant to this document, relevant national authorities were restricted in their jurisdiction over core international crimes inasmuch as the ICTY was granted supervisory function in relation to their prosecution. By the adoption of completion strategy, the Tribunal's primacy took a different shape. From that point onwards, national jurisdictions were given the leading role in war crimes prosecution in the former Yugoslavia. As anticipated, these circumstances had an impact on the war crimes prosecution within national jurisdictions. In the BiH judicial system they are reflected through the adoption of the Orientation Criteria Document in 2004, as well as in the National War Crimes Strategy in 2008 which are aimed to facilitate the national authority's efforts in their struggle to fight impunity in systematic and organized manner. The situation is in some aspects different when it comes to the ICC. Unlike the ICTY which has primacy over national jurisdictions the ICC has jurisdiction over "the most serious crimes" that are of "sufficient gravity"[153] which can be exercised only it if a state is unwilling or unable to genuinely proceed with such a case. Thus, it is not surprising that the criterion of gravity of the case, encompassing both the gravity of the crime and the degree of the responsibility of the perpetrator, lays in the essence of the ICC work.

As regards the gravity of the crime, it seems that both national instruments on criteria in BiH address its content by linking it with hierarchical status of the crime. The hierarchy is to be measured by the reference to the interest protected by the particular criminal offence such as life, physical integrity, property, etc.

Circumstances pertaining to the perpetrator seem to be more comprehensively dealt with by the Orientation Criteria Document then in international documents. A lack of reference to any mode of liability or any form of participation in a criminal offence, but solely to the hierarchical positions and roles of potential perpetrators in the Orientation Criteria Document is healed in the Strategy. The Strategy makes explicit statement that the

[152] See supra note 108.

[153] See supra note 111 and 112.

"most serious forms and degrees of participation in the perpetration of a criminal offence"[154] make a case eligible for trial before the State Court. Mode of liability of the perpetrator, that is direct perpetration, co-perpetration, participation in joint criminal enterprise, incitement, ordering, aiding and abetting, etc., is a relevant factor in determination of the seriousness of his/her responsibility. The Strategy specifies that more serious forms and degrees of participation in the perpetration of a criminal offense, that is taking part in planning and ordering of a crime, manner of perpetration, intentional and particular commitment to planning and ordering of a crime, the degree of intent justify prosecution before the State Court.[155] The Strategy states that commanders in the military, police or paramilitary establishment are to be tried before the Court of BiH. It seems that the actual distribution of cases before the State Court as opposed to other courts has been in accordance with these criteria so far. The cases including criminal offences that are not systematic and massive, that the consequences of the crime in question are significantly less severe then those of the other crimes normally prosecuted before the State Court, and in which the accused persons had no command responsibility at the time of the perpetration of the crime, have been transferred to lower courts for trial, provided that other relevant circumstances substantiated such decision.[156]

Furthermore, the criteria document of the ICTY seems to be more extensive in addressing factor to be considered as "Other relevant considerations". This document lists certain factors that are not present in other documents, neither in BiH or in the ICC, such as: the charging theories available, potential defences, theory of liability and legal framework of each potential suspect, extent to which the crime base fits in with current investigation and overall strategic direction, etc.

Close examination of different documents and practices on criteria reveals the following factors to be considered in determination of gravity of the crime: nature of the

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[154] National War Crimes Strategy, Annex A, p. 42.

[155] Ibid.

[156] See, for instance, Decion of the Court of BiH on transfer of jurisdiction in cases: X-KRO-07/476 dated 8 June 2010, X-KRO-07/433 dated 1 September 2010, X-KRO-09/673 dated 22 November 2010.

crime; scale of the crime, including the number of victims[157] and temporal and geographical circumstances of the crime; the manner of commission, which may include special cruelty or heinous commission of the crime or systematic and planned way of the commission of the crime[158]; and defencelessness of the victims of the crime. The nature of the crime is closely connected with the interest protected by the criminal offence such as life, physical integrity or property.

Similarly, all scrutinized documents give due consideration to interests of the victims or witnesses. Issues like witnesses security, the need for their protection and similar, are commonly addressed by both national and international documents. "Representativity" criterion is spelled out through the examined documents in different parts and groups of criteria they list. For example, the ICTY criteria document lists "nationality of perpetrators/victims" and "area of destruction" as relevant consideration to the gravity of the alleged conduct, but they rather seem to be adequate factors in determination of "representativity" as a criterion demanding for a balance between the degree of criminal victimization and overall prosecution scale. The Strategy also spelled out this requirement by the reference to "consequences of the crimes to local community" as a relevant consideration in the case selection and prioritization process. This may be very important given the specific social and political circumstance in BiH. As noted above, along side with the existing trend to politicize the number of victims of the war, local courts are often attacked as being biased and under political pressure for trying mainly Serb perpetrators rather then Croat and Bosniaks.[159] Thus, it may be crucial to clearly spell out and explain this criterion to the public in BiH. The public should be explained that in BiH

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[157] See for instance *Prosecutor v. Gojko Janković, Decision on Referral of case Under Rule 11 Bis*, Case No. IT-96-23/2-PT, ICTY, 22 July 2005, para. 19.

[158] Articles 7(1) and 8(1) of the ICC Statute.

[159] See for instance press release by the president of the State Court "*Court of BiH strongly denies all accusations of biased work*", available at http://sudbih.gov.ba/index.php?id=494&jezik=e [Visited February 2011]; see also Article by Nezavisne novine "*The Court of BiH ignores Serb victims*", No. 3758, 21 January 2009; *Sport Report, Independence of the Judiciary: Undue Pressure on BiH Judicial Institutions*, OSCE Mission to BiH, December 2009, p. 3 and 4, available at http://www.oscebih.org/Download.aspx?id=62&lang=EN. [Visited February 2011]

conflict, violent acts occurred throughout the territory, but some parts or areas were more affected by the crimes then other. Similarly, some communities have suffered more harm then others. Accordingly, certain communities have more of its members among those who inflicted such suffering. By giving detailed clarification to the public that the degree of victimization is to be reflected in the overall prosecution of war crimes in BiH may help reduce such unfounded criticism and enhance public trust in judiciary in general. This has not been done so far.

# 4 What are the relevant requirements for the criteria's success in the BiH post-conflict transition?

## 4.1 Public access

The legitimate interests of victims and the society in general to see and know the way the justice is being done is widely recognized in the prosecution of core international crimes as a part of criminal justice.

The BiH society that has suffered from mass atrocities in the past faces great expectations towards the criminal justice system from numerous victims, witnesses and other stakeholders. In BiH there are many associations of victims of war.[160] These organizations have very high expectations for the judicial systems. In many instances so far they have been dissatisfied with certain judicial decisions, namely the length of

[160] See for instance The Association "Woman Victim of War" Sarajevo available at http://www.zena-zrtva-rata.ba/mcd/ [Visited February 2011]; Association of detainees of BiH, at http://asp.fotoart.ba/savez/ [Visited February 2011].

imprisonment pronounced and the slow process of trying war criminals.[161] In addition the judiciary has been criticized as being under undue political pressure.[162]

Undoubtedly, victims and the public have the right to be informed why certain cases are prosecuted before others. The case selection criteria may serve as a professional mechanism for the prosecution service to explain the case selection and prioritization decisions to the victims and other external interested groups. By the use of the criteria the public is explained why it is justified to prosecute certain case prior to others. The criteria show to the public that the cases are not selected randomly or arbitrarily, or with any kind of political, ethnic or similar connotations, but rather as a result of considerations where the criteria played a major role. This may significantly reduce unwanted pressure and critique coming from the outside, increase public confidence in judicial system, which in turn, enhances the independence and legitimacy of the prosecution in general. As a result, the war crimes trial process as a whole is perceived as more fair by the general civil society.

The National War Crimes Strategy containing case selection and prioritization criteria is available to the general public on the website of the Ministry of Justice of BiH. However, the mere fact that the criteria are accessible on the Internet is not enough for the public appreciation of the criteria in any meaningful sense. There is a danger that the criteria are still not reachable and understandable to the majority of the public in BiH. Given the complexity of war crimes proceedings and the sensitivity of the post conflict situation in BiH, further steps towards full understanding of the criteria should be taken. In order to mitigate the dangers of unwanted pressure and criticism from outside, Annex A criteria should be presented in a manner that is easy understandable to the general public, possibly through public debates and presentations. This would enhance their prospects in achieving accountability for the crimes committed.

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[161] http://www.zena-zrtva-rata.ba/mcd/index.php?mod=article&cat=Obavjestenja&article=113 [Visited February 2011]; http://www.bosnjaci.net/prilog.php?pid=13976 [Visited February 2011].

[162] *Independence of the Judiciary: Undue Pressure on BiH Judicial Institutions*. OSCE Mission to BiH Spot Report, December 2009.

## 4.2 Equal and transparent application

Equal application requires that all the cases within the existing case portfolio are measured against the set of previously formulated criteria. Each and every case needs to be evaluated against the set of criteria in order to ensure that the cases are not selected arbitrarily, but rather in pursuance of prosecutorial strategy to end the impunity in a responsible manner. Transparency may enhance ability of the justice system to tackle accountability for core international crimes. It works in favour of prosecution service and criminal justice system itself. Transparent application of criteria may have a positive impact to BiH society. In addition, decision-making process driven by the criteria and made transparent to the general public may provide fertile ground for reduction of external pressures of any type.

Thus, in order to ensure equal and transparent application of criteria in BiH it was necessary to include them directly into the Criminal Procedure Code. By doing so, through amendments of Articles 449(2) and 27 of the CPC of BiH, the judiciary was obliged to apply criteria when taking over a case or transferring jurisdiction to a court.

It could be concluded that by changing the CPC of BiH both requirements, equal and transparent application, are covered to some extent. The mere fact that the essence of the criteria are now part of the law, accessible to all, is the first step towards a transparent understanding of the criteria for distribution of cases. However, further steps towards full transparency have to be taken. In that regard, the project on "Support the judiciary in BiH – Strengthening prosecutors in the criminal justice system" started by the High Judicial and Prosecutorial Council of BiH is commendable. One of the objectives of this Project is to improve the quality of public information on cases and enhance the public perception of prosecution work.[163] Such activities aiming to professionalize the work of prosecutors in relation to their abilities to adequately inform public on cases and their work may help reduce existing public criticism and pressure which is mostly the result of the lack of knowledge on prosecutorial work by public in general.

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[163] *Project Document, Support to the judiciary in BiH – Strengthening prosecutors in the criminal justice system, Final Draft.* Hight Judicial and Prosecutorial Council, 5 August 2010, p. 19, available at http://hjpc.ba/projects/tuzbih/?cid=4722,2,1.[visited February 2011]

## 4.3 Judicial review

In the ICTY and ICC the judges are given a role in securing the proper application of criteria for selection of cases. Rule 28(A) of the RoPE of the ICTY provides for the review of the indictment in order to examine whether the selection standards are met. Likewise, there are some limitations to prosecutorial discretionary decision in the case selection at the ICC. Prosecutorial decisions based on Articles 53(2)(c) and 53(1)(c) of the ICC Statute are subject to review by judges of the Pre-Trial Chamber. Similarly, by making a decision on the transfer of jurisdiction or take-over of a case, the judges of the State Court of BiH are in a position to ensure that the criteria are properly applied. Judicial review is a mechanism that ensures proper application of the criteria. Moreover, it ensures that decisions on case selection are not made arbitrarily but rather as a result of thorough examination on a set of criteria. Judicial review also provides the possibility of the appeal which would be impossible if decisions are made internally within the prosecution service. An effective judicial review may guarantee that the criteria would be equally and consistently applied in practice. In BiH a society affected with mass atrocities that is quite susceptible to various kinds of influences, judicial role in ensuring correct application of criteria seems to be quite important. As stated above, there have been around 60 decisions based on Article 27(a) of the CPC of BiH since the amendments to the CPC of BiH containing the essence of the criteria were adopted. It is commendable to see that in these decisions the judges refer to the list of considerations pertaining to each criterion as specified in the Strategy which are not listed in the CPC of BiH itself.

The Orientation Criteria Document did not provide for such possibility for judges to ensure that the criteria are applied properly. By amending Articles 449 and 27 of the CPC of BiH and including the criteria therein the prospect that the cases will be selected in line with the selection criteria are enhanced. The judges of the Court of BiH are now the ones who, by the application of the criteria, guarantee that the case will be selected and distributed depending on their complexity, as opposed to the Orientation Criteria that were not binding for the Court as such since they were part of an internal prosecution document.

## 5 Concluding remarks

The war in BiH which lasted for almost four years in the early 90's resulted in massive human life losses, wounded and injured persons, refugees and displaced persons and property destructions. Numerous war crimes have been committed entailing many suspects. Due to the mass character of the crimes committed, combined with the fact that the national judicial system was not functioning normally for years and the limited performance by the ICTY, a large number of case files accumulated. There are nearly 2000 opened war crimes cases, including almost 10, 000 suspects.[164] In 2008, BiH decided to systematically and responsibly address this issue. Thus, the National War Crimes Strategy was adopted, in order to prevent impunity and prosecute all or at least most of the perpetrators in 15 years from the adoption of the Strategy. It incorporates case selection and prioritization criteria, the essence of which later became part of the CPC of BiH.

Against this background, this thesis begins with the question: "What are the prospects and dangers of the criteria effectively addressing the question of the case backlog in Bosnia and Herzegovina of the core international crimes?"

The role of criteria is two-folded. They ensure that the most complex cases are tried before the State Court and that due priority is given to the most serious cases. Each and every case is measured against the set of criteria in order to be able to fulfil this function. With the aim to achieve the goal set forth by the Strategy, the criteria should be made public and applied equally and transparently with a certain degree of judicial review. However, there are dangerous that this may not entirely be the case.

The essence of the criteria is included in the CPC of BiH by the amendments of November 2009. Detailed lists of consideration to be taken into account in order to decide whether each criterion is satisfied are still contained in the National War Crimes Strategy only. On the other side, these amendments ensure to some extent that the criteria will be equally and transparently applied to each and every case by giving the judges of the State Court the role to decide on the complexity of cases with the reference to the criteria. By

[164] National War Crimes Strategy, p. 7.

amending Articles 449 and 27 of the CPC of BiH the prospects of the criteria's effectiveness in addressing the question of core international crimes cases are increased. The practice of the Court of BiH so far shows that the judges are using not only the essence of the criteria, but moreover they are referring to the Strategy's list of considerations pertaining to each criterion to justify their decisions taken in accordance with article 27a and 449. But, as stated above, further steps have to be taken in order to fully use the criteria's potential to effectively address the question of the case backlog in Bosnia and Herzegovina of the core international crimes. Improving the quality of prosecutors' capacity to inform the public on cases and enhancing the public perception on the prosecution work may enhance the prospects of the criteria to fight the impunity in war crimes cases, as well as reduce existing public criticism and pressure to prosecution service. Furthermore, the Strategy itself is available to the general public via the website of the Ministry of Justice of BiH. However, there is a danger that this may not be enough to reach the broader public. It is thus advisable to take measures towards broader public accessibility to the criteria in order to mitigate the dangers of unwanted pressure and criticism regarding war crimes cases and enhance the effectiveness of the criteria in the war crimes prosecutions.

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